

Sylvan Industrial Piping, Inc. and Richard E. Johnson. Case 7-CA-36135

May 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND TRUESDALE

On March 14, 1995, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision¹ in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sylvan Industrial Piping, Inc., Pontiac, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ Member Stephens notes that none of the parties in this proceeding has objected to the judge's issuance of a "bench decision," a procedure currently in effect pursuant to the Board's experimental modification of Secs. 102.35(j), 102.42, and 102.45(a) of the Board's Rules and Regulations. See 59 Fed.Reg. 65942 (1994).

Linda Hammell, Esq., for the General Counsel.
Steven Raymond, Esq., for the Respondent.

BENCH DECISION

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Detroit, Michigan, on February 23, 1995. The charge was filed on July 5, 1994, and the complaint was issued on August 31, 1994.

At issue is whether Respondent violated Section 8(a)(1) and (4) of the National Labor Relations Act by discriminatorily refusing to hire Richard E. Johnson on or about July 5, 1994. I find that it did so for the reasons stated by me on the record at the conclusion of trial.

My bench decision was delivered under the authority of Section 102.35(a)(10) of the Board's Rules and Regulations; and in accordance with Section 102.45 thereof I certify the accuracy of, and attach hereto as "Appendix A," the pertinent portion (pp. 68 through 71) of the trial transcript.

CONCLUSIONS OF LAW

Based on the entire record, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial; and that its violations have affected and unless permanently enjoined will

continue to affect commerce within the meaning of Section 2(6) and (7).

REMEDY

In addition to the customary cease-and-desist order and requirement for notice posting my Order will require Respondent to immediately and unconditionally hire Richard E. Johnson for the job he applied for and should have obtained on July 5, 1994, and make him whole for all wages and benefits he would have enjoyed but for the unlawful discrimination practiced against him, with backpay and interest accruing on and after July 5, 1994, until the date of a proper offer of employment to be calculated as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, Sylvan Industrial Piping, Inc., Pontiac, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire qualified individuals because they filed charges or gave testimony under the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately and unconditionally hire Richard E. Johnson for the job he applied for and should have obtained on July 5, 1994, and make him whole for all wages and benefits he would have enjoyed but for the unlawful discrimination practiced against him in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Pontiac, Michigan, copies of the attached notice marked "Appendix B."² Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

. . . this will be a case appropriately decided at this bench. In order to clarify my thinking, we'll take a fifteen minute recess, after which I will render a decision.

Off the record.

(A brief recess.)

JUDGE WALLACE: Back on the record.

Under the new Board regulations I am authorized in an appropriate case to issue a bench decision.

I believe this is an appropriate case.

The issues are basically very straight forward, essentially turn on a question of credibility and so I'm prepared to proceed to issue a bench decision and do so now.

There is no question that the Board has jurisdiction in this case. Jurisdiction is admitted.

The basic facts appear to be that the—Mr. Chamberlain, the charging party—

MS. HAMMELL: Correction, if I may, Your Honor. It's Mr. Johnson.

JUDGE WALLACE: Mr. Johnson. I thank you.

—Mr. Johnson, the charging party, was employed briefly for seven days in 1993 by Respondent, Sylvan.

But he was employed only after he had filed a complaint alleging that they had improperly rejected his attempt to be employed. And as a settlement agreement, he was put on the job.

There's also evidence that Mr. Johnson is not hesitant to attempt to vindicate his rights by resorting to filing actions before appropriate state authorities and federal.

The evidence also shows that about a week before July 5, 1994, he was referred to a Sylvan job by the union.

The evidence shows that there was a vacancy at Sylvan. This is confirmed by witness Chamberlain.

According to Mr. Chamberlain, the reason he did not hire Johnson was that he was so instructed by Mr. Morrissey, president of Respondent.

According to Mr. Johnson, Mr. Chamberlain in telling him that he wasn't going to hire him, added that Mr. Morrissey said that he had a propensity for filing complaints.

Based upon my hearing and observing the witnessess, I credit Johnson that Chamberlain's statement to him was that Mr. Morrissey said he wasn't going to be hired because he had filed complaints.

Part of the reason for crediting that matter is that Mr. Morrissey, when called on rebuttal, indicated that he had instructed Chamberlain that this man, Johnson, had a propensity to sue. He didn't want any part of Mr. Johnson.

In effect, that is close to corroboration of Mr. Johnson's statement as to what Chamberlain told him.

Significantly, there is no testimony, other than that statement on rebuttal by Mr. Chamberlain, as to why Johnson was not hired.

There's no indication on this record that his work in '93 was in any way unsatisfactory, nor does Mr. Chamberlain or Mr. Morrissey indicate there was no job available.

The only reason is this man's propensity to file a complaint.

Now, under section 8(a)4 [sic] of the Act, an employee is protected in filing complaints before this Board. He has a protected right to do so. He cannot be punished for doing so.

I find that the real reason why he was not hired is because he had filed a prior complaint involving Sylvan, and therefore I find a violation of 8(a)4 [sic] and 1 [sic] of the Act.

It would be my intent when I return to Washington to issue a brief order confirming what I have found on the record today and attached to that order would be a notice posted.

Off the record for a moment.

(A brief recess.)

JUDGE WALLACE: Continuing. I intend on returning to Washington to issue a supplemental decision that would incorporate my basic conclusions and findings that I've already expressed on this record.

And that supplemental decision will have an order section in the usual form an [sic] an appendix that would include—that would be a notice posting.

And in essence, the remedy will be back pay, [sic] notice posting, and also having in mind a case that's been brought to my attention in *Dean General Contractors*[,] in 285 NLRB [573], dated November 20, 1987, I will order the usual reinstatement order, albeit this is a construction case, basically for the reasons stated in that decision.

I believe I've already stated that when I issue my supplemental decision, the parties—that will, in effect, trigger the time period or filing exceptions.

Are there any other matters to be brought to my attention?

MS. HAMMELL: None at this time, Your Honor.

MR. RAYMOND: Just to make it clear, you said at the time that order is issued, that's when the time period will trigger for objections? I didn't—

JUDGE WALLACE: For exceptions.

MR. RAYMOND: For exceptions. Yes.

JUDGE WALLACE: Any exceptions to the decision which, under the normal Board procedure would be directed to the Board itself.

There being nothing further, I want to compliment counsel for both sides. I think it's been highly professional.

And we will, with that, go off the record.

(Whereupon, at 3:40 p.m., the hearing was concluded.)

APPENDIX B

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to hire qualified individuals because they filed charges or gave testimony under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL immediately and unconditionally hire Richard E. Johnson for the job he applied for and should have obtained on July 5, 1994, and make him whole, with interest, for all wages and benefits he would have enjoyed but for the unlawful discrimination practiced against him.

SYLVAN INDUSTRIAL PIPING, INC.